UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHRISTOPHER HUDSON, in his individual capacity on behalf of himself and others similarly situated, Plaintiff, v. NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL, *et al*., Defendants.	No. 1:18-cv-4483-RWS

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS BROUGHT ON BEHALF OF DEFENDANTS, THE RETIREMENT BOARD OF THE BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN, KATHERINE BLACKBURN, RICHARD CASS, TED PHILLIPS, SAMUEL McCULLUM, ROBERT SMITH, AND JEFFREY VAN NOTE

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PRELIMINARY STATEMENT

Plaintiff Christopher Hudson has brought this putative class action against the Retirement Board ("Board") of the Bert Bell/Pete Rozelle NFL Player Retirement Plan ("Plan") and its six individual voting members, the NFL Management Council, and the NFL Players Association (hereafter, "Defendants")[1] on the theory that all of them have breached their fiduciary duties under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), by providing an allegedly deficient Summary Plan Description ("SPD").[2] As a remedy, Hudson asks the Court to unseat the Board; toss out a discretionary Plan interpretation that no less than two federal courts have said is reasonable; resurrect an untold number of prior disability determinations and have them re-decided under a standard of Hudson's own choosing; and preclude the NFL Management Council and the NFL Players Association, the Plan's sponsors, from exercising their legal right to alter, amend, or eliminate disability benefits.

Although styled as a class action aimed at protecting the rights of thousands of Plan participants ("Players"), this case is merely Hudson's latest maneuver in a years-long campaign to undo the Board's decision on ***his*** request for reclassification of benefits, and claim additional benefits ***for himself***. Rather than take the Board's decision head-on in a claim for benefits under ERISA section 502(a)(1)(B), however, Hudson has concocted a class-wide theory of liability that springs from ERISA's disclosure and fiduciary obligations and turns on the allegation that the

[1] The undersigned counsel represents the Board and the six individual members of the Board named as Defendants. This motion is brought on behalf of the Board and its members. The NFL Management Council and the NFL Players Association are separately represented, and they are filing their own motions to dismiss the claims brought against them.

[2] A copy of the relevant Plan Document is attached to the Declaration of Michael L. Junk as Exhibit A. *See* Compl. ¶ 21 ("The relevant written instrument of the Plan within the meaning of ERISA § 402(a) is the Bert Bell/Pete Rozelle NFL Player Retirement Plan Amended and Restated as of April 1, 2009."). A copy of the relevant SPD is attached to the Declaration of Michael L. Junk as Exhibit B. These documents are properly before the Court because they are central to Plaintiff's claims and their authenticity is not in dispute. *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991).

SPD did not explain how strictly the Board interpreted the Plan's reclassification provision. If the SPD had done so, Hudson claims, he and others like him never would have applied for benefits in the first place; they simply would have waited for medical science to advance to the point that it conclusively linked their impairments to NFL football, and then—and only then—would they have applied for, and been awarded, the level of benefits Hudson says they deserve. *See* Compl. ¶¶ 3-5 (alleging that studies from 2017 and 2018 have linked various conditions to NFL football, and participants who sought T&P benefits without such evidence may have been awarded Inactive benefits and fallen into "a trap for the unwary").

The Complaint fails to state a single viable cause of action for multiple reasons.

First, Hudson's fundamental allegation is implausible. It defies common sense to suggest that an unemployed, disabled Player would refuse to apply for or accept disability benefits based on the sheer ***possibility*** that he might get a larger monthly payment if he just sits back for seven or eight years, and lets fate take its course. A Player who waits years to apply sacrifices years of potential benefits. Furthermore, disability benefits are not vested; they can be reduced or even eliminated at any time by the collective bargaining parties. No one can predict the future. Nothing is certain. And no Player would ever forego benefits to which he is entitled because of the possibility of an unknowable, future event, regardless of what the SPD said or did not say.

The Complaint's omissions best exemplify the implausibility of Hudson's core allegation. For example, how can the Court accept Hudson's theory that Players have been unwittingly "trapped" by the SPD's failures, Compl. ¶ 5, when the Complaint never alleges that Hudson ever read the SPD—or that he even knew about the reclassification option—before applying for T&P benefits? Furthermore, how plausible is Hudson's premise that he would have been better off awaiting the scientific community's increased understanding of post-concussion

syndrome and CTE, Compl. ¶ 3, when the Complaint makes no attempt to explain how the alleged advancements that he vaguely alludes to would have made any difference to the Board's discretionary decision regarding his (or any other Player's) specific claim for benefits? The Complaint is a series of implausible allegations born of utter speculation based on 20/20 hindsight. It does not plausibly allege that anything would be different for Hudson today if the SPD had contained the additional information or illustrations that he says it should have.

Second, the SPD at the center of this litigation was not deficient. It summarized the actual Plan provisions as the law requires, and it reasonably apprised any Player that a request for reclassification would be subject to a higher standard than an initial application for benefits.

Third, the applicable statutes of limitations bar any claims brought under ERISA sections 102 and 404.

For these reasons, and for the reasons explained more fully below, the Court should dismiss Hudson's Complaint with prejudice.[3]

STATEMENT OF FACTS

The Plan is an ERISA-governed, defined-benefit pension plan that also provides disability benefits to eligible Players. The Board is the Plan's named fiduciary; it has discretionary authority to interpret the Plan and determine all claims for benefits. Plan Doc. § 8.2.

In 2011, the Board awarded Hudson total and permanent disability ("T&P") benefits. Compl. ¶ 32. After a full and fair review that included an initial decision and two administrative appeals, the Board found that Hudson was not totally disabled due to NFL football activities—

[3] This memorandum of law addresses every claim except Count III, which is brought against the NFL Management Council and the NFL Players Association exclusively.

despite Hudson's arguments to the contrary—and for this reason awarded him "Inactive" T&P benefits, the lowest of four categories provided by the Plan. Compl. ¶¶ 32-33.[4] At the time, Hudson did not challenge the Board's final decision.

Three years later, Hudson asked the Board to reclassify his benefits to the higher-paying, "Football Degenerative" category. Compl. ¶ 35. Hudson's request invoked Plan Section 5.5(b), a unique provision that allows reclassification of a prior final decision, but only if a Player presents "clear and convincing evidence" of "changed circumstances" that qualify him for a higher category of benefits. Compl. ¶¶ 28, 35. With his request for reclassification, Hudson tried to prove all over again that his disability was caused by NFL football activities, because he viewed that issue as the only thing standing between him and Football Degenerative benefits. *See* Compl. ¶¶ 35-37 (describing the substance of Hudson's reclassification request); Plan Doc. § 5.1(c) (describing requirements for Football Degenerative benefits, including the requirement that the Player be totally and permanently disabled due to League football activities).

In May 2015, the Board denied Hudson's reclassification request. Compl. ¶ 38. In its decision letter, the Board explained that it interprets the reclassification provision's "changed circumstances" requirement to mean a new or different impairment, Compl. ¶ 38, as opposed to new evidence or new arguments about the same impairment(s) that led to an initial T&P award.

In August 2015, Hudson sued to overturn the Board's decision. *See* Compl. ¶ 40 (acknowledging that "Hudson filed a federal complaint in the Northern District of Mississippi").[5]

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[4] Hudson's Complaint confuses the categories of T&P benefits at issue. To be clear, the Plan provides four types of T&P benefits: (1) "Active Football," (2) "Active Nonfootball," (3) "Football Degenerative," and (4) "Inactive." *See* Plan Doc. § 5.1 (describing categories of T&P benefits). Two are relevant here: Inactive (the benefit that Hudson receives) and Football Degenerative (the increased benefit that Hudson has sought). *See* Compl. ¶¶ 24-25 (explaining that the Plan provides four types of T&P benefits, and noting that Inactive and Football Degenerative benefits are relevant here).

[5] The suit was styled *Hudson v. Retirement Board*, Case No. 3:15-cv-128 (N.D. Miss.).

Shortly after the litigation began, however, Hudson agreed to stay the case and remand his claim for benefits to the Board. *See* Compl. ¶ 40 (acknowledging that "the parties attempted to work out a fair and impartial method for reaching an unbiased resolution in this case"). He did so for two reasons. First, Hudson recognized that two federal courts had previously upheld the Board's interpretation of the reclassification provision, and this doomed his intended challenge of that interpretation. *See Boyd v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 796 F. Supp. 2d 682, 693 (D. Md. 2011) ("Here, the entity to which deference is owed—the Board—has adopted a . . . reasonable[] interpretation. The Board's interpretation does not violate the ordinary meaning of the term 'changed circumstances,' and it is not contrary to any other provision in the Plan. In addition, [the plaintiff] has not shown that, in the past, the Board construed 'changed circumstances' in a different manner. Accordingly, the Board did not abuse its discretion in interpreting the terms of the Plan."); Order at 14-15, *Bryant v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, No. 1:12-cv-936 (N.D. Ga. filed Mar. 23, 2015) (Dkt. No. 45) (attached to the Declaration of Michael L. Junk as Exhibit C) ("[T]his Court concurs with the decision of the *Boyd* court that the Plan's interpretation of the term 'changed circumstances' as meaning a change in physical condition is within the authority of the Plan and reasonable."). Second, remand gave Hudson another chance to show that he met the "changed circumstances" requirement.[6]

[6] By the time Hudson agreed to the remand, he said he actually had a new impairment: headaches. To ensure fairness and give Hudson every opportunity to make his case for Football Degenerative benefits, the Board agreed to accept whatever additional evidence Hudson cared to submit, and also have him examined. The entire remand process followed a "protocol"—that was agreed-to by Hudson and his attorneys—which specified the materials that would be given to the doctors and the exact questions they would be asked. Ultimately, two preeminent, neutral neurologists examined Hudson at length, performed multiple tests, and reported that he was not totally disabled by his headaches, and that NFL football was not the primary cause of them. *See generally* Letter from Michael B. Miller to Christopher Hudson (Nov. 22, 2016), attached as Exhibit D to the Declaration of Michael L. Junk (cited in paragraph 44 of the Complaint).

In November 2016, at the conclusion of this "fair and impartial" remand process, Compl. ¶ 40, the Board denied Hudson's request for Football Degenerative benefits. Compl. ¶ 44. Dissatisfied with that outcome, but seeing the futility of challenging the remand proceedings (which he had consented to and fully participated in) and the Board's "changed circumstances" interpretation (which two federal courts explicitly said was reasonable), Hudson voluntarily dismissed his benefit claim and threatened a class action lawsuit instead. He made good on that threat more than a year later by filing the instant Complaint.

ARGUMENT & AUTHORITIES

I. Counts I And II Fail For One Overarching Reason: The Allegations Are Implausible.

Count I alleges a failure to provide information required by section 102 of ERISA, 29 U.S.C. § 1022 (2012). Count II alleges that the Retirement Board breached fiduciary duties imposed by section 404(a) of ERISA, 29 U.S.C. § 1104 (2012). Both counts should be dismissed because they rest on the same implausible premise: That Hudson and other Players would never have applied for or accepted disability benefits if only the SPD had disclosed additional information about the Board's interpretation of the Plan's reclassification provision. Compl. ¶¶ 3-5.

In evaluating a motion to dismiss, a court accepts factual allegations as true and draws "all ***reasonable*** inferences in favor of the plaintiff." *Salveson v. JP Morgan Chase & Co.*, 663 F. App'x 71, 74 (2d Cir. 2016) (emphasis added) (citing *Caro v. Weintraub*, 618 F.3d 94, 97 (2d Cir. 2010)). "'To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is ***plausible on its face***.'" *Id.* (emphasis added) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to

draw on its ***judicial experience*** and ***common sense***." *Iqbal*, 556 U.S. at 679 (emphasis added). "'Plausibility thus depends on a host of considerations: the full factual picture presented by the complaint, the particular cause of action and its elements, and the existence of alternative explanations so obvious that they render plaintiff's inferences unreasonable.'" *L–7 Designs, Inc. v. Old Navy, LLC,* 647 F.3d 419, 430 (2d Cir. 2011). *See also Metz v. U.S. Life Ins. Co.*, No. 09 Civ. 10250(BSJ), 2010 WL 3703810, at *2 (S.D.N.Y. Sept. 21, 2010) (dismissing claims that a plaintiff patient incurred the entire expense for health services rendered by her provider under Medicare on the basis that the allegation was "implausible"). In the end, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Hudson's allegations do not pass muster under *Twombly* and *Iqbal* because they defy common sense. A Player faces a number of uncertainties when he applies for T&P benefits. He is unemployed, he is likely unemployable, and consequently he may not know how he is going to support himself and his family. Every Player's situation is different. One thing, however, is certain: When a Player fills out a T&P benefits application, he can explain why he believes he is entitled to benefits, but the outcome of the application is unknown. He does not know what the Plan's neutral physicians may report, or whether the Board will ultimately find him totally and permanently disabled. *See* Plan Doc. § 5.2(c) (authorizing referrals to independent physicians); *id*. § 8.2 (granting the Board discretionary authority to interpret the Plan and determine claims for benefits). Nor does a Player know for certain what category of benefits he will receive, because the category depends on multiple factors such as the timing of the Player's application, the timing of his total and permanent disability, and the cause of his total and permanent disability. *See* Plan Doc. § 5.1 (distinguishing between the four categories of T&P benefits); see

also id. § 5.5(a) ("In determining the appropriate classification of benefits for a Player who is totally and permanently disabled, it will be conclusively presumed that the Player was not totally and permanently disabled for all months or other periods of time more than forty-two months prior to the date the Retirement Board receives a written application . . . .").

In the face of this uncertainty—and regardless of what the SPD said or did not say about the ability to reclassify T&P benefits—no truly disabled Player would delay an application in the hope that a future scientific breakthrough might someday help convince the Board that his disabilities are related to NFL football. What if those breakthroughs never come? What if they have no relevance to the Player's particular facts? What if the Plan changes and the benefits go away in the meantime? *See Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995) (noting that plan sponsors are generally free under ERISA, "for any reason at any time," to adopt, modify, or terminate health benefits).

The conspicuous absence of any allegations connecting the SPD's supposed failures to Hudson's decision to apply for benefits or his alleged harm underscores the implausibility of Hudson's core allegations. The Court will search the Complaint in vain for any allegation that Hudson ever read the SPD prior to applying for T&P benefits, much less that he read the reclassification section and formed some understanding of how that might affect him. The only logical conclusion drawn from this silence is that the SPD played no part in Hudson's decision to apply for T&P benefits when he did, or his acceptance of the Board's award of Inactive benefits. Thus, Hudson would be no better off today if the SPD contained the additional information and illustrations he says it should have.

The premise that Hudson or any other Player would choose to sit back and await potential scientific advancements rather than apply for and receive T&P benefits is undermined by

Hudson's failure to explain how the scientific advancements referenced in his Complaint would have inevitably led to an award of Football Degenerative benefits for him. In one paragraph, the Complaint vaguely references two studies from 2017 and 2018 and alleges that, "[i]n recent years, the scientific community has significantly increased its understanding of traumatic brain injuries." Compl. ¶ 3. What this means for Hudson is left to the imagination, however. And rightly so. Hudson acknowledges that "[t]hese conditions . . . are difficult to diagnose;" they "requir[e] extensive testing and ruling out other more common conditions;" and it can be years "before a conclusive diagnosis can be made or before additional evidence is obtained." Compl. ¶ 3. Even with the benefit of hindsight, it would be pure speculation for Hudson or anyone else to say how recent scientific advancements in an area so fraught with uncertainty would have impacted the Board's discretionary determination of Hudson's application for T&P benefits.[7] The fact that Hudson does not even attempt an explanation exemplifies precisely why no rational Player would ever postpone a disability application. No one can predict scientific advancements or their impact.

Given the implausibility of Hudson's allegations, the Complaint does not "raise [his] right to relief above the speculative level," *Twombly*, 550 U.S. at 555, because it provides no credible basis to suggest that the alleged deficiencies in the SPD impacted Hudson in any way. *See Amara v. Cigna Corp.*, 925 F. Supp. 2d 242, 253 (D. Conn. 2012) (equitable remedy of reformation is available if a plaintiff can show, by clear and convincing evidence, that he was

[7] When Hudson first applied for benefits, multiple neutral physicians evaluated him and assessed his impairments. After reviewing the record as a whole, the Board found, in its discretion, that Hudson's cognitive impairment was primarily attributable to depression, Compl. ¶ 33, which due to a specific Plan provision made him ineligible for Football Degenerative benefits. *See* Plan Document (Ex. A to Junk Decl.) § 5.1(h) (explaining categories of T&P benefits available for disabilities resulting from psychological or psychiatric disorders). It is pure speculation for Hudson to claim—in conclusory fashion, no less—that later scientific advancements would have changed this outcome.

mistaken about the nature of his benefits), *aff'd*, 775 F.3d 510 (2d Cir. 2014); *id*. at 258 (equitable remedy of surcharge requires proof that alleged breach caused plaintiff's loss); *see also Cigna Corp. v. Amara*, 563 U.S. 421, 444-45 (2011) (discussing the forms of equitable relief available under section 502(a)(3) of ERISA and noting that "actual harm" must be shown to obtain surcharge relief); *Loren v. New York City Dep't of Educ.*, No. 13-CV-7597 VEC, 2015 WL 3917490, at *6-7 (S.D.N.Y. June 25, 2015) (dismissing First Amendment retaliation claims as implausible where the link between the plaintiff's refusal to sign a media waiver and his discharge from employment was too attenuated to be believable).

II. Count I Fails As A Matter Of Law For Additional Reasons.

Count I alleges that the SPD violated section 102(a) of ERISA, 29 U.S.C. § 1022(a), by not explaining or illustrating the Board's interpretation of two aspects of the reclassification provision: (i) the phrase "clear and convincing evidence," Compl. ¶¶ 70-71, and (ii) the "changed circumstances" requirement. Compl. ¶¶ 74-75. This claim should be dismissed because procedurally it is barred by the statute of limitations, and substantively it is based on an extraordinarily broad and ultimately insupportable interpretation of section 102 of ERISA.

A. Count I was brought more than three years after Hudson reasonably should have known of the alleged deficiencies in the SPD.

A three-year statute of limitations applies to Hudson's section 102 claim. *See Osberg v. Foot Locker, Inc.*, 907 F. Supp. 2d 527, 533 (S.D.N.Y. 2012) ("[T]he appropriate limitations period is the three year period governing statutory violations."), *aff'd in part and vacated in part*, 555 Fed. Appx. 77 (2d Cir. 2014). Because the claim was brought on May 21, 2018, it is barred if Hudson knew or reasonably should have known about the Board's interpretation of the reclassification provision at any point prior to May 21, 2015.

Although Hudson alleges that he first learned of the Board's interpretation when he received the Board's decision letter on May 27, 2015, Compl. ¶¶ 38-39, he had constructive knowledge much sooner. In 2011, a federal district court upheld the Board's interpretation in a published decision. *See Boyd*, 796 F. Supp. 2d at 692-93 ("The Board's interpretation [to require a change in physical condition] does not violate the ordinary meaning of the term 'changed circumstances,' and it is not contrary to any other provision in the Plan. In addition, Boyd has not shown that, in the past, the Board construed 'changed circumstances' in a different manner. Accordingly, the Board did not abuse its discretion in interpreting the terms of the Plan."). Arguably, Hudson was on constructive notice of the Board's interpretation from the moment of that decision. *See Hutton v. Deutsche Bank AG*, 541 F. Supp. 2d 1166, 1171 (D. Kan. 2008) (holding that claims for breach of fiduciary duty, fraud, negligent misrepresentation and conspiracy, based on allegedly bad tax advice, were time-barred because the statute of limitations began to run when the IRS published a document that would have put the plaintiff on notice of his claim). Even if he was not on notice with the publication of the *Boyd* decision, Hudson was represented by counsel during the administrative process as early as March 27, 2015. *See* Letter from Robert Donati to Paul Scott (Mar. 27, 2015), attached as Exhibit E to the Declaration of Michael L. Junk[8] (cited in paragraph 37 of the Complaint). Assuming Hudson or his counsel exercised a modicum of due diligence in conjunction with the prosecution of his request for reclassification, any reasonable investigation would have revealed the *Boyd* decision, and with it the Board's interpretation of the reclassification provision, before May 21, 2015. *See Vay v. Huston*, No. 14-769, 2015 WL 4461000, at *2 (W.D. Penn. July 21, 2015) (holding that a plaintiff did not have good cause to amend a complaint where the plaintiff's attorney "had a duty

[8] In this letter, Hudson's counsel appealed the initial decision denying Hudson's request for reclassification.

to investigate the factual underpinnings of his client's claims" and failed to do so, and noting that "it is good practice to utilize publicly accessible sources of information . . . to investigate a client's claims"). Hudson therefore had constructive knowledge of the Board's interpretation prior to May 21, 2015, and Count I is untimely.

B. Section 102 requires that an SPD describe the *terms of the plan*, not discretionary *interpretations of the terms* of the plan.

Section 102 of ERISA is titled "Summary plan description." Subsection (a) mandates that an SPD "shall include the information described in subsection (b), shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022(a). Subsection (b) requires that an SPD contain, among other information, "the plan's requirements respecting eligibility for participation and benefits," and the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits." 29 U.S.C. § 1022(b).

As the title and text of section 102 illustrates, its focus is limited to ensuring that an SPD discloses material ***plan terms*** to participants. *See generally* 29 C.F.R. § 2520.102-3 (2018) ("The summary plan description must accurately reflect the ***contents of the plans*** as of the date not earlier than 120 days prior to the date such summary plan description is disclosed.") (emphasis added). Hudson cannot dispute that the SPD did exactly that: It accurately summarized the actual terms of the Plan, which was collectively bargained by the NFL Management Council and the NFL Players Association.[9] Hudson alleges the SPD should have done more, but section 102 does not expressly require that an SPD contain the plan fiduciaries'

[9] *Compare* Plan Doc. § 5.5(b) (reclassification provision), *with* SPD at 18 (summarizing the reclassification provision).

discretionary ***interpretation*** of the plan's terms. No case imposes such a requirement, either. *See McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 194 (2d Cir. 2007) (rejecting argument that the defendants violated section 102 by not including in an SPD the actuarial assumptions used for calculation of early retirement benefits, and stating: "[N]either ERISA nor the Labor Department's regulations require a summary plan description to describe or illustrate every method by which a plan benefit may be limited under an early payment option or similar such limitation.").[10] In fact, cases finding section 102 violations deal with SPDs that fail to disclose, describe, or explain the actual terms of a plan. *See, e.g.*, *Frommert v. Conkright*, 738 F.3d 522, 532 (2d Cir. 2013) (finding a violation of section 102 where "the SPDs fail[ed] to clearly identify the circumstances that [would] result in an offset" under the plan); *Burke v. Kodak Ret. Income Plan*, 336 F.3d 103, 111 (2d Cir. 2003) (holding that SPD violated section 102 where it did not properly disclose a crucial eligibility requirement stated in the plan itself).[11]

Hudson's novel section 102 allegations are impossible to square with the realities of plan administration. Every plan has language that is subject to interpretation, and it has been blackletter law for decades, if not longer, that a plan administrator may be given discretionary authority to interpret such language. *See Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989) ("A trustee may be given power to construe disputed or doubtful terms, and in such circumstances the trustee's interpretation will not be disturbed if reasonable."). Still, section 102

[10] *See also Lee v. Verizon Commc'ns, Inc.*, 954 F. Supp. 2d 486, 590-91 (N.D. Tex. 2013) (holding that an SPD was not required to disclose that participants could be removed from the plan when Verizon transferred its pension obligations to an insurance company).

[11] *See also Layaou v. Xerox Corp.*, 238 F.3d 205, 210 (2d Cir. 2001) (holding that SPD violated section 102 where it "failed to provide notice to . . . employees that their future benefits would be offset by an appreciated value of their prior lump-sum benefits distributions"); *Osberg v. Foot Locker, Inc.*, 138 F. Supp. 3d 517 (S.D.N.Y. 2015) (finding violation of section 102 where SPD purposely did not explain that changes to plan terms caused "wear-away" with respect to individual participants' retirement accounts), *aff'd,* 862 F.3d 198 (2d Cir. 2017).

of ERISA does not expressly compel plan administrators to explain and illustrate the impact of every discretionary interpretation in an SPD, as Hudson alleges the Board should have done here. It would be impractical for a fiduciary to devise an SPD that explained how each plan term is or might be interpreted, and impossible to produce and disseminate an updated SPD every time a new or slightly different interpretation took shape.

C. Hudson has not plausibly alleged that the SPD failed to reasonably apprise him of his rights and obligations.

Hudson alleges that the SPD violated section 102 of ERISA because it failed to properly inform Players of the import of the Plan's reclassification provision, namely that a higher standard applied to requests for reclassification. Compl. ¶¶ 5, 80. This allegation is implausible.

Under section 102, an SPD should "***reasonably apprise***" Players "of their rights and obligations under the plan." 29 U.S.C. § 1022(a) (emphasis added). The SPD in effect at the time of Hudson's initial application fulfilled this requirement. The SPD explained the requirements for each of the four categories of T&P benefits, SPD at 15-17, and under an "**Initial Classification**" heading it noted that a Player's initial classification would be "determined by the Disability Initial Claims Committee or the Retirement Board based on all of the facts and circumstances in the administrative record." SPD at 18. Under a separate "**Reclassification**" heading, the SPD stated:

> As long as you remain totally and permanently disabled, you will continue to receive total and permanent disability benefits under the category for which you first qualify, unless you present evidence for reclassification that the Disability Initial Claims Committee or the Retirement Board finds to be clear and convincing. You must be able to demonstrate that, because of changed circumstances, you satisfy the conditions of eligibility for a benefit under a different category of total and permanent disability benefits.

Id.

Even assuming the average Player would not understand the precise meaning of the phrase "clear and convincing," which Hudson calls "legal jargon," Compl. ¶¶ 71-73, or exactly how the Board would interpret "changed circumstances," Compl. ¶¶ 75-77, the overall context of the Reclassification section would reasonably apprise any reader that a reclassification request would be held to a higher standard than an initial application for benefits. The Reclassification section stood on its own; it began with the presumption that Players would continue to receive the category of benefits that they were originally awarded; and it explained the sole exception to this presumption using terms—*i.e.*, "clear and convincing" evidence of "changed circumstances"—that were vastly different from that used to describe how Players' T&P benefits would initially be classified. *See Robinson v. Sheet Metal Workers' Nat'l Pension Fund, Plan A*, 441 F. Supp. 2d 405, 437 (D. Conn. 2006) ("Though [the SPD's use of] the term 'vested' may not have been ideal, . . . [r]ead in context, . . . the Court does not believe that the Vested Status discussion in the 1997 SPD misleadingly implied to beneficiaries that their IRD benefits could never be altered."), *aff'd in part*, *appeal dismissed in part*, 515 F.3d 93 (2d Cir. 2008).[12]

III. Count II Fails As A Matter Of Law For Additional Reasons.

Count II of Hudson's Complaint alleges that the Board had "an affirmative duty" to disclose how it interpreted the phrase "changed circumstances," and that the failure to disclose that information was a breach of the fiduciary duties of loyalty and prudence imposed by section 404(a) of ERISA. Compl. ¶¶ 81-88. The claim fails not only because it is untimely, but also because the Complaint provides no factual basis for it.

A. Count II is untimely under ERISA's "Limitation of Actions" provision.

[12] As noted elsewhere, the Complaint does not allege that Hudson has ever read the SPD. It also does not specifically allege that Hudson did not or would not surmise that a request for reclassification would be subject to a higher standard of evidence and proof.

Count II is untimely under ERISA's "Limitation of Actions" provision. Section 413 of the statute provides:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of—
>
> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission the latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

29 U.S.C. § 1113. Subsection (1) is a statute of repose; it absolutely bars any claim brought more than six years after the date of the purported violation or breach, or, in the case of an omission, the last date on which the defendant could have cured the breach or violation. *California Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2050 (2017) (citing to 29 U.S.C. § 1113 as an example of a statute of repose); *Caputo v. Pfizer, Inc.*, 267 F.3d 181, 188 (2d Cir. 2001).

1. Hudson brought the claim more than six years after the date he alleges the Board breached its duty to him.

In Count II, Hudson alleges that the Board breached its fiduciary duties ***before*** he applied for T&P benefits. *See* Compl. ¶ 84 ("The Board Defendants had an affirmative duty [under section 404(a)(1) of ERISA] to disclose that the term 'changed circumstances' had been interpreted in a specific manner by the Board in advance of the time that Plaintiff and the Class filed their initial claim for benefits seeking a determination of disability benefits under the Plan."). Because he applied for T&P benefits on March 9, 2010, Compl. ¶ 32, any cause of action for a breach of fiduciary duties that occurred on or before that date had to be brought by

March 9, 2016, at the latest. Hudson brought Count II more than ***two years*** past the repose period under 413(1)(A) of ERISA.

2. Hudson brought the claim more than six years after the last date the Board could have cured its alleged breach of duty.

If Hudson characterizes the alleged breach as an "omission," the result is no different. Under section 413(1)(B), the relevant time period for an omission begins to run on "the latest date on which the fiduciary could have cured the breach or violation." *See also Moyle v. Liberty Mut. Ret. Benefit Plan*, No. 10CV2179-GPC(MDD), 2016 WL 7242021, at *13 (S.D. Cal. Dec. 15, 2016) ("Since Plaintiffs' claims are premised on an omission of material fact, a six year statute of limitations from the latest date on which the fiduciary could have cured the breach or violation applies."). "[T]he last opportunity to cure in an omissions case is on the last date the defendant could have averted [p]laintiffs' detrimental reliance on the omitted information." *Id.* (internal punctuation and citations omitted). This is because the term "cure," as used in section 413, means "to fix," rather than "to find a remedy." *Olivo v. Elky*, 646 F. Supp. 2d 95, 102 (D.D.C. 2009) (citing *Librizzi v. Children's Mem'l Med. Ctr.*, 134 F.3d 1302, 1307 (7th Cir. 1998)).[13]

Hudson alleges that the Board failed to disclose its interpretation of the reclassification provision, leading to Hudson being "locked into" a lower level of T&P benefits immediately upon receiving the Board's final decision on his initial application. Compl. ¶ 80; *id.* ¶ 88. The

[13] *See also Fischer v. Carpenters Pension & Annuity Fund of Philadelphia & Vicinity*, No. CIV.A. 10-3048, 2012 WL 602170, at *5 (E.D. Pa. Feb. 24, 2012) ("[T]o the extent that Plaintiff's claim is based on an alleged omission, Defendant's last opportunity to 'cure' the omission was . . . the last date on which Defendant could have averted Plaintiff's detrimental reliance on the incomplete information by advising him of the effect of any Social Security Disability award."); *Hartquist v. Emerson Elec. Mfg. Co.*, No. 1:11CV1067, 2016 WL 1312028 (M.D.N.C. Mar. 31, 2016) (holding that the last date on which the defendants could have cured the breach, and therefore the date of accrual for a breach of fiduciary duty claim, was the last date that the plaintiff could have made a claim for benefits under the applicable plan's terms).

Board made its final determination on Hudson's initial application on May 20, 2011. Compl. ¶ 33. Thus, under Hudson's own logic, the last chance the Board had to advise Hudson about its interpretation of "changed circumstances" and prevent him from "locking" himself into a lower level of benefits was that same date—May 20, 2011. After that date, the initial application had been decided, and Hudson had to satisfy the reclassification standards in order to obtain a different level of benefits. Because the Complaint was not filed until May 21, 2018, Count II is untimely under section 413(1)(B) of ERISA.

B. Section 404(a) does not impose a duty to disclose information beyond what is required by section 102.

Count II borrows the same Count I allegation that the Board failed to disclose its interpretation of "changed circumstances" and alleges, in conclusory fashion, that it is also a breach of the fiduciary duties imposed by section 404(a) of ERISA. This claim fails as a matter of law because section 404(a) of ERISA does not impose a duty to disclose information in an SPD beyond what is already required by ERISA section 102.

Weiss v. CIGNA Healthcare, Inc., 972 F. Supp. 748 (S.D.N.Y. 1997), is analogous. In *Weiss*, the plaintiff was a participant in an employee welfare benefit plan who alleged that defendant CIGNA had a fiduciary duty to disclose its financial agreements with primary care physicians. *Id.* at 752. The plaintiff asserted claims for CIGNA's alleged failure to disclose this information under both sections 102 and 404 of ERISA, both of which were rejected. *Id.* at 753. First, the court determined that section 102's requirements did not require the disclosure of physician compensation information in SPDs. *Id.* The court then went on to determine that section 404 did not impose a fiduciary duty to provide the information, noting that it would be "inappropriate" to infer disclosure obligations not set forth in sections 101 through 111 of ERISA "'on the basis of general provisions that say nothing' about such duties." *Id.* at 754

(quoting *Bd.of Trustees of the CWA/ITU Negotiated Pension Plan v. Weinstein*, 107 F.3d 139, 147 (2d Cir. 1997)). And the court held that no fiduciary duties imposed by ERISA required the disclosure of the information in question. *Id.*; *see also Faircloth v. Lundy Packing Co.*, 91 F.3d 648, 657 (4th Cir. 1996) (rejecting argument "that ERISA's general fiduciary duty provision, § 404(a)(1)(A), requires plan fiduciaries to furnish documents to participants and beneficiaries in addition to the documents that ERISA's specific disclosure provision, § 104(b)(4), requires the plan administrator to furnish" on the basis that "[s]uch a holding would conflict with the principle that specific statutes govern general statutes").

C. To the extent section 404(a) imposes an additional duty to disclose, the Complaint does not allege facts plausibly supporting a breach of the duty of loyalty or prudence.

Section 404(a) of ERISA states that a "fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries" for the purpose of providing them benefits. 29 U.S.C. § 1104(a)(1)(A). It also requires fiduciaries to act "with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1)(B). These are commonly referred to as ERISA's duties of loyalty and prudence, and in four short, conclusory paragraphs, Hudson alleges the Board violated them both. *See* Compl. ¶¶ 84-87 (alleging that the Board had a duty to disclose, and that it breached this duty "[b]y failing to communication [sic] this information about the interpretation of the standard necessary to obtain a reclassification"); *and see Twombly*, 550 U.S. at 555 ("[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.").

If an SPD-based disclosure claim like this can be brought under section 404, Hudson has not alleged that the Board acted with improper motives. Nor can he. Three of the six voting members of the Board—Sam McCullum, Robert Smith, and Jeff Van Note—are former players appointed by the NFL Players Association. Compl. ¶¶ 11-12, 17-19. These three Board members are just like Hudson, and thus they plainly share his interest in a fair and reasonable interpretation and application of the Plan. Given the presence of three former Players on the Board, every court to address the question has held that the Board has no conflict of interest as a matter of law. *See, e.g.*, *Boyd*, 796 F. Supp. 2d at 690-91; *Johnson v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 468 F.3d 1082, 1086 (8th Cir. 2006); *Courson v. Bert Bell NFL Player Ret. Plan*, 75 F. Supp. 2d 424, 431 (W.D. Pa. 1999).

Hudson cannot plausibly allege that the Board breached its duty of prudence. Perhaps this is why Count II is equally devoid of facts supporting Hudson's allegation that it did. A breach of fiduciary duty claim based on a communication or a failure in communication typically exists when a plan administrator acts from a position of superior knowledge and "'affirmatively misrepresents the terms of a plan or fails to provide information when it knows that its failure to do so might cause harm.'" *Osberg*, 138 F. Supp. 3d at 552 (quoting *Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d 76, 88 (2d Cir. 2001)), *aff'd*, 862 F.3d 198 (2d Cir. 2017).[14] Hudson

[14] Defendant concedes that *Osberg* runs counter to the argument in subsection III.B. above, in that Judge Forrest found that communications in an SPD supported a cause of action under both section 102 and section 404 of ERISA. *Osberg*, however, presented "a more egregious set of circumstances than *Amara*," 138 F. Supp. 3d at 524, which is to say a set of circumstances far different than those alleged here. Foot Locker knew a change in its retirement plan would result in "wear-away" and negatively impact most employees, and yet Foot Locker misleadingly presented the plan change as good news, and purposely omitted the negative information from its communications to participants. *Id.* at 529-30. Further, the SPD not only failed to disclose the wear-away which would reduce most participants' benefits, but it also contained statements that were blatantly false. *Id.* at 533. In determining that Foot Locker had breached its fiduciary duties, the court noted that Foot Locker "knew that employees would have the mistaken belief that a growing account balance meant a growing benefit," and it purposely did not explain the wear-away concept to its employees. *Id.* at 555-56.

does not allege that the Board affirmatively misrepresented the terms of the Plan in the SPD. He does not allege that the Board had any reason to know that medical science would advance in a way helpful to him in the seven or eight years following his award of Inactive T&P benefits. And, even today, he does not explain how any of the scientific articles alluded to in his Complaint could plausibly have changed the outcome on his application or any other Player's. The Board is not omniscient, and so it could not know that its alleged failure to include additional information in the SPD would harm Hudson or any other similarly situated Player.

Hudson's breach-of-fiduciary-duty claim exists only with the benefit of hindsight. But "[a] court should not find that a fiduciary acted imprudently in violation of ERISA § 404(a)(1)(B) merely because, with the benefit of hindsight, a different decision might have turned out better." *Osberg*, 138 F. Supp. 3d at 552.

IV. Count IV Should Be Dismissed Because Hudson Does Not Have Standing To Challenge An Amendment To An Entirely Different Plan.

In Count IV of the Complaint, Hudson seeks a declaration that a 2017 amendment to the NFL Player Disability & Neurocognitive Benefit Plan does not apply to him. Compl. ¶ 101. Hudson has no standing to bring this claim, however, because the NFL Player Disability & Neurocognitive Benefit Plan is a separate plan. Compl. ¶ 21. Hudson is a participant in the Bert Bell/Pete Rozelle NFL Player Retirement Plan, *i.e.*, ***the*** Plan; his benefits are paid by ***the*** Plan; his request for reclassification was decided by the Retirement Board, which is the named fiduciary of ***the*** Plan; and the allegedly-deficient SPD that forms the basis for this entire case is the SPD for ***the*** Plan. *See, e.g.*, Compl. ¶ 10 (alleging that Hudson is a participant in "the Plan"); *id*. ¶ 21 ("The Bert Bell/Pete Rozelle NFL Player Retirement Plan is the Plan that governs Plaintiff's disability benefits."); *id*. ¶¶ 38-39 (alleging that the Retirement Board denied Hudson's request for reclassification). Hudson has not suffered any injury fairly traceable to any

act or omission involving the NFL Player Disability & Neurocognitive Benefit Plan or any amendment thereto, and he therefore has no constitutional standing to pursue Count IV. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 180-81 (2000) (To establish constitutional standing, "a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and 3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.") (citation omitted).

V. Count V Should Be Dismissed Because Hudson Does Not Have Standing To Invalidate The Plan's Contractual Limitations Provision; The Count Is Untimely; And The Plan's Limitations Provision Does Not Violate ERISA.

Count V of Hudson's Complaint focuses on the contractual limitations provision found at Plan Section 11.7(b). That provision reads:

> Except as provided in Section 11.7(a) [regarding claims for benefits], no action alleging an omission, violation, or breach of any responsibility, duty, or obligation imposed by this Plan (or any internal rule, guideline, or protocol) or any applicable law may be commenced after the earlier of—
>
> (1) six years after the date of the omission, violation, or breach, or
>
> (2) three years after the earliest date on which the plaintiff had actual or constructive knowledge of the omission, violation, or breach,
>
> except as provided in ERISA section 413 (but only where the fraud or concealment is separate from the offense and intended to conceal the existence of the offense).

The SPD summarizes the Plan's limitations provision as follows:

> With respect to all other types of claims [i.e., other than a claim for benefits], you may not commence a legal action in a court after the earlier of—
>
> - six years after the date of any omission, violation, or breach of any responsibility, duty, or obligation imposed by the Retirement Plan or applicable laws, or

- three years after the earliest date that you knew or should have known of any such omission, violation, or breach, except that, depending on the facts, certain exceptions may apply.

If you do file a legal action after these limitations periods have expired, the court may dismiss your claim.

SPD at 38.

Hudson claims that the Plan's limitations provision is void as against public policy "[t]o the extent that" it conflicts with section 413 of ERISA because it impermissibly "attempts to relieve these Defendants of their responsibility or liability to discharge their fiduciary duties under ERISA" in violation of section 410 of ERISA. Compl. ¶ 110. Assuming that Plan Section 11.7(b) violates ERISA and goes against public policy, Hudson then claims that it was a breach of fiduciary duty for any of the Plan's fiduciaries to adopt Plan Section 11.7(b) and disseminate an SPD discussing it. Compl. ¶ 111. Finally, Hudson alleges that the SPD violates section 102 of ERISA because it does not contain adequate explanations or illustrations of circumstances that might toll the statute of limitations. Compl. ¶ 107.

Hudson has no constitutional standing to complain about Plan Section 11.7(b) or the alleged deficiencies in the SPD relating to it because the Complaint does not articulate how he has ever been harmed by either. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. at 181.

Even if Hudson had standing to bring Count V, it is untimely. Hudson first played in the NFL in 1995, Compl. ¶ 10, and he has been a Plan participant since that time. Plan Doc. (Ex. A to Junk Decl.) (explaining that "Active Players are participants in the Plan"); *id*. § 1.29 (defining "Player" as any person who is or was under contract to play football in the NFL). As Hudson acknowledges, Compl. ¶¶ 104-06, the Plan and the SPD have included the same allegedly offensive language since at least 2009 and 2010, respectively. *See* Plan Doc. § 11.7(b); SPD at 38. Any claim under section 102 of ERISA should have been filed by 2013 in light of the three-

year statute of limitations that applies to such claims. *Osberg*, 138 F. Supp. 3d at 559. Any claim for breach of fiduciary duty under ERISA section 404 should have been brought by 2015 at the very latest. 29 U.S.C. § 1113 (breach of fiduciary duty claim must be brought within six years of the breach, or three years of plaintiff's knowledge of the breach, whichever is earlier).

Finally, Hudson's claim that Plan Section 11.7(b) conflicts with section 413 of ERISA and violates section 410 of ERISA has no merit. First, Plan Section 11.7(b) does not conflict with section 413 of ERISA; it basically quotes section 413 of ERISA and states that it controls "except as provided in ERISA section 413." Compl. ¶ 104. Second, if Plan Section 11.7(b) varies from section 413 of ERISA in any meaningful way, that is not actionable. Plans can adopt different limitations provisions. *See Hewitt v. W. & S. Fin. Grp. Flexible Benefits Plan*, No. 17-5862, 2018 WL 3064564, at *2 (6th Cir. Apr. 18, 2018) (holding that a plan could adopt a limitations provision different than the ERISA section 413 default) (citing *Heimeshoff v. Hartford Life & Accident Ins. Co.*, 571 U.S. 99, 107 (2013)). Third, section 410 of ERISA concerns "Exculpatory Provisions," *i.e.*, those that purport to exonerate fiduciaries or "relieve" them "from responsibility or liability." 29 U.S.C. § 1110(a). Repose and limitations provisions do not exonerate or relieve a fiduciary; they just limit the timeframe in which an action seeking to hold them accountable can be brought. *See Heimeshoff*, 571 U.S. at 114-15 (finding a plan's limitations provision to be consistent with ERISA).

Hudson's allegation that the SPD violated section 102 of ERISA by failing to "provide any explanation, examples, or illustration[s] of what facts would result in an exception," Compl. ¶ 107, to a strict application of the statute of limitations is meritless. Section 102 of ERISA does not require a plan administrator to imagine scenarios that might toll a statute of limitations and

then provide that legal advice to a participant in an SPD. *See* 29 U.S.C. § 1022(b) (listing the required contents of an SPD); 29 C.F.R. 2520.102-3 (same).

CONCLUSION

For the foregoing reasons, the Court should dismiss Hudson's Complaint.

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Respectfully submitted,

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